Midwest Precision Heating & Cooling, Inc. and Midwest Heating and Air Conditioning, Inc., alter egos and a single employer *and* Sheet Metal Workers Local No. 2, affiliated with Sheet Metal Workers International Association, AFL–CIO. Case 17–CA–20825

March 11, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 19, 2001, Administrative Law Judge James L. Rose issued the attached decision. The Respondents and the General Counsel each filed exceptions to the decision and an accompanying supporting brief. The General Counsel also filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and to adopt the recommended Order as modified.

We adopt the judge's findings that Respondent Midwest Heating and Air Conditioning (Air Conditioning) was an alter ego of Respondent Midwest Precision Heating & Cooling (Precision)[2]; that the Respondents violated Section 8(a)(5) and (3) of the Act by discharging Precision's union-represented employees; that the Respondents further violated Section 8(a)(3) by offering Precision's bargaining unit employees jobs (still performing unit work) with Air Conditioning on the condition that there would be no union or collective-bargaining agreement; and, finally, that the Respondents violated Section 8(a)(5) by repudiating the applicable collective-bargaining agreement and refusing to bargain with the Union.

1. In challenging the judge's alter ego finding, the Respondent relies upon *First Class Maintenance Service*, 289 NLRB 484 (1988), and *Victor Valley Heating & Air Conditioning*, 267 NLRB 1292 (1983), for its argument that common ownership is lacking here. Both cases are distinguishable. In *First Class Maintenance*, the new entity maintained entirely separate management, operations, and supervision from the older entity. In *Victor Valley*, the two entities were operated separately and the new entity was established to take over a field of business that the older entity was abandoning. In both cases, the older businesses continued as separate, ongoing concerns, and there was no evidence that the new entities were set up to avoid the unions. In contrast, the evidence here supports a finding that Air Conditioning was established as a vehicle to replace Precision and continue the existing family business without the Union.

The two businesses shared substantially identical management and supervision, business purpose, operations, equipment, and customers. Further, the judge correctly found that the additional indicia of ownership of the companies by members of the same family supports an alter ego finding under *Cofab, Inc.*, 322 NLRB 162 (1996), enfd. 159 F.3d 1352 (3d Cir. 1998) (citing familial association among owners as one of relevant factors supporting alter ego status). As the Respondent argues, ownership by members of the same family does not compel a finding of substantially identical ownership, because it does not inherently indicate common control. See *Adanac Coal Co.*, 293 NLRB 290 (1989). However, it "militates in favor of an alter ego finding" where, as here, other relevant factors are shown. *Cofab*, supra, at 163.

It bears noting, however, that the alter ego finding here is further supported by evidence that John Lambert did exert some control over both entities. Both Jeff Lambert and Bill Jones testified to John's increased control over Precision's operations after William Lambert's accident. And although John Lambert testified that he was "not at all" involved in Precision's affairs after late 1999 or January 2000, his initials are on several of Precision's documents approving changes to ongoing projects as late as July 2000, and correspondence on Precision projects during this time was addressed to him. Even if the evidence does not go decisively to the highest levels of control, together it casts sufficient doubt on the Respondent's claim that control of the two companies was separate.

In sum, we affirm the judge's finding that Air Conditioning was an alter ego of Precision.

2. In limited exceptions, the General Counsel argues that the judge erroneously failed to find that the Respondents further violated Section 8(a)(5) by dealing directly with bargaining unit employees, and that the judge failed

[1] The Respondent has effectively excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Given the judge's alter ego finding, we find it unnecessary to pass on his additional finding that Air Conditioning and Precision constitute a single employer.

to clearly provide make-whole relief for employees who performed bargaining unit work for Air Conditioning on and after March 1, 2000.[3] We find merit in the General Counsel's exceptions.

(a) As described above, the judge found that the Respondents violated Section 8(a)(3) by offering Precision's bargaining unit employees jobs with Air Conditioning on the condition that there would be no union or collective-bargaining agreement. Paragraph 8(e) of the complaint alleged that, apart from the unlawful condition of the Respondents' offers, the Respondents also violated Section 8(a)(5) by bypassing the Union and dealing directly with employees over terms and conditions of employment. As the General Counsel points out, however, the judge never addressed the direct-dealing allegation.

The record evidence establishes that the Respondents engaged in back-and-forth discussions with individual employees over various matters, including wage rates and vacation time, in soliciting them to leave Precision for Air Conditioning. For instance, the judge found that Air Conditioning owner John Lambert twice discussed with unit employee Timothy Troy Hutton the possibility of him working for Air Conditioning. Hutton accepted a position with Air Conditioning after Lambert offered him a $2 per hour wage increase, a company van, and paid vacation and holidays, among other things. Similarly, unit employee Walt Eastwood testified without contradiction that John Lambert offered him a wage increase and additional vacation time to join Air Conditioning. Initially, Eastwood did not respond to the offer, but later agreed to work for Air Conditioning after Lambert increased the wage offer and promised additional benefits.[4] Thus, the record evidence supports the allegation in Section 8(e) of the complaint. Accordingly, we find that the Respondents violated Section 8(a)(5), and shall provide a cease-and-desist order. See generally *Dayton Newspapers*, 339 NLRB No. 79, slip op. at 4 (2003) (directly offering reinstatement to employees on condition that they forego protected activity); see also *RTP Co.*, 334 NLRB 466, 467 (2001), enfd. 315 F.3d 951 (8th Cir. 2003), cert. denied 124 S.Ct. 51 (2003) (dealing directly with employees over wages and benefits).

(b) The General Counsel's claim that the judge failed to clearly provide make-whole relief for certain employees relates to the judge's finding that Air Conditioning began performing new residential installation work—work that was covered under the labor agreement between Precision and the Union—but, commencing March 1, 2000, unlawfully failed to abide by the agreement.[5] As a result, employees who performed unit work after that date for Air Conditioning were unlawfully denied the wage rates and benefits called for by the agreement. The judge commented in the body of his decision that the Respondents would be ordered to "make whole any employees harmed as a result of this unlawful action." As the General Counsel points out, however, it appears that the judge inadvertently failed to provide such relief for certain employees.

Some of the employees harmed by Air Conditioning's repudiation of the agreement were Precision unit employees who, upon being discharged by Precision, went to work for Air Conditioning. The judge provided the appropriate make-whole relief for these employees. However, other employees who worked for Air Conditioning had either left Precision prior to the shutdown or had never worked for Precision at all. These employees were harmed by Air Conditioning's failure to honor the contract. As the General Counsel points out, the judge did not clearly provide the appropriate make-whole relief for these employees in the remedy and order sections of the decision. We shall correct these inadvertent omissions.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Midwest Precision Heating & Cooling, Inc. and Midwest Heating and Air Conditioning, Inc., Kansas City, Missouri, alter egos, and their respective officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following new paragraph 1(d) and reletter the subsequent paragraphs.

"(d) Bypassing the Union as the exclusive representative of employees in the bargaining unit and dealing directly with employees over terms and conditions of employment."

2. Insert the following new paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Make whole employees who performed bargaining unit work for Midwest Heating and Air Conditioning, Inc. on and after March 1, 2000, for any losses suffered as a result of the Respondents' unlawful failure to abide by the terms of the 1999 Agreement between Midwest Precision Heating & Cooling, Inc. and the Union, *Kraft*

[3] The Respondents have not filed a brief answering the General Counsel's exceptions.

[4] Eastwood ultimately changed his mind and did not accept the position with Air Conditioning at that time.

[5] Air Conditioning did not abide by the agreement prior to March 1, but, in the absence of a precise date, the judge appropriately found that Air Conditioning's repudiation of the agreement began 6 months prior to the filing of the charge on August 31, 2000.

Plumbing and Heating, Inc., 252 NLRB 891 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), to be computed as provided in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest compounded in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), including making contractual payments and contributions to the Union and the benefit funds on their behalf, with interest and other required payments computed in the manner prescribed in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979)."

3. Substitute the attached notice for that of the administrative law judge.[6]

Dated, Washington, D.C. March 11, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge employees because of their union activity.

WE WILL NOT repudiate the collective-bargaining agreement covering wages, hours, and working conditions within the Union's craft jurisdiction.

WE WILL NOT solicit or hire employees contingent on their agreement to work without the benefit of representation by the Union.

WE WILL NOT bypass the Union as the exclusive representative of employees in the bargaining unit and deal directly with employees over terms and conditions of employment.

WE WILL NOT fail and refuse to bargain with the Union as the exclusive representative of employees in the bargaining unit as described in the Decision (the craft jurisdiction of the Union) within the meaning of Section 9(a) of the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to Allan Debacker, Danny Duckett, Steve Groom, Mark Heather, Aaron Hobbs, Dennis Larkin, George Rohleder, David Svejda, Steve Todd, and James Waters to their former jobs, or if those jobs no longer exist, to substantially equivalent positions of employment, and WE WILL make them whole for any loss of wages or other benefits they may have suffered as a result of our discrimination against them, with interest.

WE WILL make whole the unit employees by transmitting the contributions owed to the Union's health and welfare, pension, and other funds pursuant to the terms of the 1999 Agreement with the Union, and by reimbursing the unit employees for any medical, dental, or any other expenses ensuing from our unlawful failure to make such required contributions, with interest.

WE WILL make whole employees who performed bargaining unit work for Midwest Heating and Air Conditioning, Inc. on and after March 1, 2000, for any losses suffered as a result of the Respondents unlawful failure to abide by the terms of the 1999 Agreement between Midwest Precision Heating & Cooling, Inc. and the Union, with interest, including making contractual payments and contributions to the Union and the benefit funds on their behalf, with interest and other required payments.

WE WILL recognize and bargain with Sheet Metal Workers Local No. 2, affiliated with Sheet Metal Workers International Association, AFL–CIO, as the exclusive representative of our employees within its craft jurisdiction.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL continue in full force and effect the 1999 Agreement, effective from July 1, 1999, to June 30, 2002.

MIDWEST PRECISION HEATING & COOLING, INC. AND MIDWEST HEATING AND AIR CONDITIONING, INC., ALTER EGOS

Mary G. Traves and *Susan Wade-Wilhoit, Esqs.*, for the General Counsel.

Thomas M. Moore, Esq., of Kansas City, Missouri, for the Respondent, Midwest Heating and Air Conditioning, Inc.

Kerri Reisdorff, Esq., of Kansas City, Missouri, for the last shareholder of Midwest Precision Heating & Cooling, Inc.

John P. Hurley, Esq., of Kansas City, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Overland Park, Kansas, June 19–21, 2001, on the General Counsel's complaint alleging that the two named Respondents are alter egos and constitute a single employer, and that they committed various violations of Section 8(a)(1), (3), and (5) of the National Labor Relations.

Respondent Midwest Heating and Air Conditioning, Inc. (Air Conditioning), generally denied that it committed any violations of the Act and affirmatively contends it was not the alter ego of Midwest Precision Heating & Cooling, Inc. (Precision), nor did they constitute a single employer.

Respondent Precision also denied the material allegations of the complaint and affirmatively alleges that the complaint should be dismissed as being barred by Section 10(b) of the Act.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following findings of fact, conclusions of law, and recommended Order.

I. JURISDICTION

Both Respondents admit that during the times material to this action, they did business as Missouri corporations from a facility located in Kansas City, Missouri, and annually purchased and received directly from points outside the State of Missouri, goods, products, and materials valued in excess of $50,000. Both Respondents admit, and I find, that they are employers engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Sheet Metal Workers Local No. 2, affiliated with Sheet Metal Workers International Association, AFL–CIO (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Although there are additional historical facts, material to the ultimate issues in this matter are the following.

For many years William L. Lambert (William) was the sole owner and principal manager of Precision, a company engaged in installation of heating and air-conditioning units for new residential construction. He hired members of the Union, many of whom had been employees for years, and executed successive collective-bargaining agreements with the Union, the most recent of which is effective from July 1, 1999, to June 30, 2002.

William was also the sole owner and principal manager of Midwest Heating and Cooling, Inc. (Heating and Cooling) which was a nonunion company engaged in servicing heating and air-conditioning units. Prior to the events here, the employees of Heating and Cooling did not do work within the Union's craft jurisdiction and were not covered under the Union's collective-bargaining agreement.

Both companies did business from the same building in Kansas City, Missouri, with the Precision operation on the first floor and Heating and Cooling on the second.

William had three sons, Jeff, Jack, and John, all having worked for their father since they were teenagers. At the time of the hearing Jeff was 43, John 36, and Jack 37 or 38. Jeff was the shop foreman for Precision and a union member, Jack was basically in charge of Heating and Cooling and John assisted William in managing Precision. William Jones had duties similar to John, which included directing employees, preparing bids and purchasing materials.

In late 1997 or early 1998, William decided to retire and he discussed with his sons their buying the business; however, there is little in the record about this, the sons contending that there was an argument and he refused to sell to them on grounds that he did not think they were competent to run the company. Notwithstanding his retirement, William continued to come into the shop about 3 days a week and continued to make management decisions, although more of the day-to-day operation fell to John and Jones.

On March 11, 1999, William was in a serious automobile accident, as a result of which he was in intensive care for some time followed by a long period of rehabilitation. From then on, William had no significant input in the running of either company, notwithstanding that John, according to his testimony, continued to be denied information concerning Precision's finances. According to him, only William and his longtime secretary and office manager, Mary Preston, knew the financial details of either Precision or Heating and Cooling.

In July 1999, Air Conditioning was incorporated by John. As of January 2000, John and Jack each owned 50 percent of the stock. The legal work was done by William's attorney (counsel for the Air Conditioning here).

In early January 2000, John and Jack reached an agreement with William whereby they would purchase the assets of Heating and Cooling for approximately $20,000, a figure arrived at by William's longtime accountant. Shortly thereafter, they agreed with William to purchase the assets of Precision for about $412,000, the note to be paid at the rate of $5000 per

month. Again, the figure was arrived at by William's accountant. When William died unexpectedly in January 2001, the unpaid balance of the note was forgiven pursuant to a provision in the note.

In the spring of 2000, Jones purchased all of William's stock in Heating and Cooling for $1000, as a favor to William, according to Jones, notwithstanding that John and Jack had previously purchased all the assets of Heating and Cooling. About the same time, Jeff purchased all the stock in Precision for $500, again, notwithstanding that John and Jack had previously purchased all of Precision's assets.

In any event, by early spring of 2000, John and Jack, doing business as Air Conditioning, began doing the work formally done by Heating and Cooling, and some of the work of Precision, although Precision, with its union employees continued to operate, with Jeff and Jones as the principal managers. It is undisputed that Air Conditioning employees would work on some of the same projects and doing the same work as Precision employees. At this time Precision had no assets or line of credit, therefore it purchased all needed materials from Air Conditioning. Precision did the shop work for Air Conditioning and Precision subcontracted finish work to Air Conditioning. Thus, the business previously engaged in by Precision was commingled between Precision and Air Conditioning.

On July 28 Jeff and Jones informed each of the remaining union employees (and the Union) that Precision was no longer in business. The employees were terminated, and given a small severance payment. The reason given by Jeff and Jones for ceasing business as Precision was principally economic—the labor costs for the union employees was too great to be competitive. Jeff and Jones then went to work for Air Conditioning, doing essentially the same work they had done for Precision. As Jeff testified, he knew that on shutting down Precision, Air Conditioning "would pick up the slack."

The management situation now is as it was prior to the creation by Air Conditioning. Jeff supervises the shop and John, along with Jones, supervise the installation employees, solicit business, and deal with building contractors. Jack runs the repair and service operation.

B. Analysis and Concluding Findings

1. Alter ego

The principal issue in this matter is whether Air Conditioning is the alter ego of Precision. As the Board said in *Advance Electric*, 268 NLRB 1001, 1002 (1984): "The legal principles to be applied in determining whether two factually separate employe[r]s are in fact *alter egos* are well settled. Although each case must turn on its own facts, we generally have found *alter ego* status where the two enterprises have 'substantially identical' management, business purpose, operation, equipment, customers, and supervision, as well as ownership." (Citations omitted.)

All these factors are present in the instant matter, in addition to which I conclude that business of Precision was taken over by Air Conditioning in order to reduce labor costs by repudiating the collective-bargaining agreement—that is, avoiding their responsibilities under the Act. E.g., *Fugazy Continental Corp.*, 265 NLRB 1301 (1982). Indeed, the only reasonable explanation for William's sons to go through the legal hoops of creating a new corporation and terminating old ones was ultimately to avoid their obligations under the collective-bargaining agreement. They may have felt justified in doing this on grounds that the union employees did not always work 8 hours for 8 hours pay, the Union did not furnish needed men and the contract wage was too high and, according to John's testimony, scheduled to go higher. The fact remains that the business had responsibilities under the Act which its owners cannot with impunity reject simply because they want.

It is not clear why Jones bought the shell of Heating and Cooling or Jeff bought the stock of Precision. Perhaps it was thought that these transactions would somehow be a barrier and protect Air Conditioning. In any event, I conclude that these transactions do not affect my conclusion that Air Conditioning is the alter ego of and a single employer with Precision (as well as Heating and Cooling).

I conclude that notwithstanding the legal paper shuffling, the object was for Air Conditioning to appear to be the same company as Precision. In fact they took over all of their father's business and continued to operate as he had. The names of the three companies here are similar, all beginning with "Midwest" and having some form of heating and air cooling or air conditioning in the name. The telephone book and other ads proclaim the common identity ("39 years in business" and "40th Anniversary . . . Clearance Sale") and the telephone numbers are the same.

Although much is made by the Respondent of the assertion that William ran Precision as a "dictator," at least for the year between his accident and the time Air Conditioning began operation, management and supervision of Precision was in John, Jack, Jeff, and Jones. There is evidence that William's management style was more lax than his sons, that he was less interested in growing the business and John and Jack may be doing a better job of keeping their accounts payable current and collecting accounts receivable.

Air Conditioning purchased all of Precision's assets, including inventory and equipment. They clearly had the same business purpose, even though Air Conditioning's business combined that of Heating and Cooling as well as Precision. They have substantially the same customers and suppliers. And during the transaction period before Precision actually went out of business and discharged all its union employees, Precision relied on Air Conditioning for supplies and they did work for each other.

The only substantive distinction between the two companies is ownership. Whereas William owned Heating and Cooling and Precision, John and Jack are the co-owners of Air Conditioning. While the Respondent asserts that William had determined not to sell his company to his sons, in fact he did so. John and Jack bought the assets of Heating and Cooling for about $20,000 and Precision for about $412,000, both of which figures were arrived at by William's accountant and the papers drafted by William's attorney. John and Jack paid about $60,000 on the note prior to their father's death. The rest was forgiven, making the transfer of ownership of assets essentially an inheritance. The sale and purchase of assets here was scarcely an arms length transaction. I conclude that the change

of ownership from father to sons does not affect the conclusion that the resulting company is the alter ego of the former. As the Board has held, common ownership is not a necessary condition for alter ego, but where two assertedly separate companies are wholly owned by members of the same family, the enterprise never lost its character as a closed corporation. *Crawford Door Sales Co.*, 226 NLRB 1144 (1976).

As the Board said in *Cofab, Inc.*, 322 NLRB 162, 163 (1996): "In other words, in evaluating all of the relevant factors, where two entities are virtually indistinguishable but for the difference in ownership of the entities by members of the same family, substantially identical ownership is established."

I conclude that regardless of the technical changes in the structure of these companies, for all appearances—to employees, customers and suppliers—Air Conditioning is indistinguishable from Precision and Heating and Cooling. As Jones testified, after the purported changes, new construction is still downstairs and service still upstairs. In fact, there appears to have been no real attempt to disguise the continued identity of the business, except in papers filed with the Missouri Secretary of State. Given the common business purpose, management, operations, equipment, customers, supervision, substantially identical ownership, holding out to be the same business and an attempt to evade responsibilities under the Act, I conclude that Air Conditioning is the alter ego of Precision and they constitute a single employer.

From this I conclude that Air Conditioning was, and is, bound by Precision's collective-bargaining agreement with the Union and the attendant responsibilities to the Union and its employees under the Act.

2. The alleged violations of Section 8(a)(3)

It is alleged that the Respondent hired Mark McMahan, Kevin Williams, Troy Hutton, Steve Groom, and Steven Todd "contingent upon their agreement to work without benefit of the Union's representation."

Thomas Troy Hutton testified that he had worked for Precision as a union sheet metal worker about 5-1/2 years before the events here. In April, undeniably, John "asked me if he had to go non-Union and shut down the Union side of the business, if I'd be willing to go non-Union and stick around and continue to work for him." Hutton said he would have to think about it. Then in June, Hutton asked John what was going to happen, since he feared losing his job to nonunion help. John offered him a job, giving him a $2 per hour wage increase, "a company van, a newer one, a helper, paid vacation, and paid holidays." Hutton accepted.

The Monday following the termination of all the remaining union employees on July 28, Hutton quit, explaining that he did not think John's enterprise was going to "pan out" and that "I couldn't work for a guy that just fired someone who worked for him 18, 20 years, you know."

John testified that he hired Precision employees Steve Groom, Steve Todd, Mark McMahon, and Kevin Williams for Air Conditioning, telling them that the company was nonunion and that the collective-bargaining agreement would not apply. Indeed, on July 28, John testified that he offered jobs at his nonunion company to all Precision employees except Jim Waters and Dan Duckett. Offering employment to one contingent on his rejecting the Union and the collective-bargaining agreement is clearly violative of Section 8(a)(1) and (3) of the Act, and I so find.

It also alleged that the discharge on July 28 of Precision's remaining union employees was violative of Section 8(a)(3). I agree. There is no doubt—indeed it is admitted—that shutting down Precision's operation as such was based on a decision by the Lamberts to be rid of the labor costs associated with paying the wages and benefits under the collective bargaining agreement.

Accordingly, I conclude that by discharging Allan Debacker, Danny Duckett, Steve Groom, Mark Heather, Aaron Hobbs, Dennis Larkin, George Rohleder, David Svejda, Steve Todd, and James Waters, because of their membership in the Union the Respondent violated Section 8(a)(3). I shall recommend an appropriate remedy.

3. The alleged violations of Section 8(a)(5)

The Respondents admit that beginning in 1981 Precision was a party to collective-bargaining agreements with the Union covering all employees engaged in the following work:

> (a) manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing and servicing of all ferrous or nonferrous metal work and all other materials used in lieu thereof and of all Air-Veyor systems and air handling systems regardless of material used including the setting of all equipment and all reinforcements in connection therewith; (b) all inner lagging and outer lagging over insulation, removal of all inner lagging and outer lagging and all duct lining, including pre-form round duct lining installed in the field; (c) adjusting of all air handling equipment and duct work in connection with testing and balancing; (d) the preparation of all shop and field sketches used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches; all shop and field sketches, regardless of how produced, shall bear a Local No. 2 detailer stamp and/or the name and card number of the sheet metal worker who prepared the drawings; and (e) all other work included in the jurisdictional claims of Sheet Metal Workers' International Association.

The scope clause of the agreement goes on to identify more specifically work within the claimed jurisdiction of the Union. I conclude that for many years the Union was the representative of all Precision's employees doing work within the craft jurisdiction of the Union, as set forth in the collective-bargaining agreement. And I conclude that this was an appropriate bargaining unit under Section 9(a) of the Act.

Since I conclude that Air Conditioning was the alter ego of, and a single employer with, Precision, Air Conditioning was bound by the current collective-bargaining agreement, which it began to breach shortly after commencing operations in February 2000. Precisely when Air Conditioning's employees began doing the work covered by the collective-bargaining agreement is uncertain. It appears that Air Conditioning first began doing the work previously done by Heating and Cooling, with Precision union employees continuing to do work covered under the

collective-bargaining agreement. Soon thereafter, possibly as early as March 2000, Air Conditioning started doing collective-bargaining agreement work. Then, when Precision discharged all its union employees, Air Conditioning adsorbed all the work previously done by Precision as well as Heating and Cooling without any apparent hiatus. As Jeff noted, Air Conditioning "picked up the slack."

Since no precise date is available, I conclude that Air Conditioning began to repudiate the terms of the collective-bargaining agreement by March 1, 2000, a date 6 months prior to the filing of the charge. Though Air Conditioning may have begun doing collective-bargaining work in February, there is no persuasive evidence so indicating.

By ceasing to recognize the Union as the exclusive representative of its employees doing the work above described, and discharging unit employees, I conclude that the Respondent violated Section 8(a)(5) and it will be ordered to cease and desist such activity, bargain with the Union and make whole any employees harmed as a result of this unlawful action.

REMEDY

Having concluded that the Respondent Air Conditioning is the alter ego of Precision and they constitute a single employer and they committed certain violations of the Act, I shall recommend that they cease and desist therefrom and take appropriate remedial action, including offering reinstatement to Allan Debacker, Danny Duckett, Steve Groom, Mark Heather, Aaron Hobbs, Dennis Larkin, George Rohleder, David Svejda, Steve Todd, and James Waters to their former or substantially equivalent positions of employment and make them whole for any losses they may have suffered as a result of the discrimination against them in accordance with the provisions of *F.W. Woolworth, Co.,* 90 NLRB 289 (1950); and transmit the contributions owed to the Union's health and welfare, pension and other funds pursuant to the terms of the collective-bargaining agreement and reimburse unit employees for any medical, dental, or any other expenses ensuing from the Respondent's unlawful failure to make such required contributions in accordance with the provisions of *Kraft Plumbing & Heating,* 252 NLRB 891 (1980), with interest as provided by *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

Midwest Precision Heating & Cooling, Inc. and Midwest Heating and Air Conditioning, Inc., alter egos and a single employer, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their interest in and activity on behalf of the Union.

(b) Repudiating the collective-bargaining agreement covering the wages, hours, and working conditions of the employees in the bargaining unit described above.

(c) Soliciting and hiring employees contingent on their agreement to work without benefit of representation by the Union.

(d) Refusing to bargain with the Union as the exclusive representative of employees in the bargaining unit described above within the meaning of Section 9(a) of the Act.

(e) In any other manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to, Allan Debacker, Danny Duckett, Steve Groom, Mark Heather, Aaron Hobbs, Dennis Larkin, George Rohleder, David Svejda, Steve Todd, and James Waters to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the Remedy section of this decision, including transmitting the contributions owed to the Union's health and welfare, pension and other funds pursuant to the terms of the collective-bargaining agreement with the Union, and by reimbursing unit employees for medical, dental, or any other expenses ensuing from its unlawful failure to make such required contributions.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Recognize and bargain with the Union as the exclusive representative of its employees in the bargaining unit described above and continue in force and effect the collective-bargaining agreement between it and the Union.

(d) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

has gone out of business or closed its facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since the date of this Order.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, San Francisco, California, September 19, 2001

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge our employees because of their interest in and activity on behalf of the Union.

WE WILL NOT repudiate the collective-bargaining agreement covering the wages, hours, and working conditions of the employees working within the Union's craft jurisdiction.

WE WILL NOT solicit or hire employees contingent on their agreement to work without benefit of representation by the Union.

WE WILL NOT refuse to bargain with the Union as the exclusive representative of employees in the bargaining unit described in the Decision (the craft jurisdiction of the Union) within the meaning of Section 9(a) of the Act.

WE WILL NOT in any other manner, interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to Allan Debacker, Danny Duckett, Steve Groom, Mark Heather, Aaron Hobbs, Dennis Larkin, George Rohleder, David Svejda, Steve Todd, and James Waters to their former jobs, or if those jobs no longer exist, to substantially equivalent positions of employment and we will make them whole for any loss of wages or other benefits they may have suffered as a result of our discrimination against them, with interest.

WE WILL make whole the unit employees by transmitting the contributions owed to the Union's health and welfare, pension, and other funds pursuant to the terms of the collective-bargaining agreement with the Union, and by reimbursing unit employees for medical, dental, or any other expenses ensuing from our unlawful failure to make such required contributions, with interest.

WE WILL recognize and bargain with Sheet Metal Workers Local No. 2, affiliated with Sheet Metal Workers International Association, AFL–CIO, as the exclusive representative of our employees working within its craft jurisdiction.

WE WILL continue in full force and effect the collective bargaining agreement between Sheet Metal and Air Conditioning Contractors' National Association, Kansas City Chapter, Inc., and the Union effective from July 1, 1999, to June 30, 2002.

MIDWEST PRECISION HEATING & COOLING, INC. AND MIDWEST HEATING AND AIR CONDITIONING, INC. ALTER EGOS AND A SINGLE EMPLOYER